Colonie Hill Ltd., and John Smythe Food Services Inc., Successor to Colonie Hill, Ltd. and Lackman Food Services of Hauppauge, Inc. *and* **Mauro Squicciarini.** Case 29-CA-3457

SUPPLEMENTAL DECISION AND ORDER

On August 6, 1974, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] directing Respondent Colonie Hill Ltd., *inter alia*, to make whole certain employees for their losses resulting from unfair labor practices committed by Respondent in violation of Section 8(a)(1), (2), and (3) of the Act. Thereafter, the Board's Order was enforced by the United States Court of Appeals for the Second Circuit.[2]

Pursuant to a backpay specification and notice of hearing issued by the Regional Director for Region 29, and order amending backpay specification and notice of hearing issued by the Acting Regional Director for Region 29, a hearing was held on January 22, 23, and 24 and June 11 and 12, 1979, before Administrative Law Judge Leonard M. Wagman for the purpose of determining the amount of backpay due the employees.

On December 23, 1980, the Administrative Law Judge issued the attached Supplemental Decision and Order. Thereafter, Charging Party Mauro Squicciarini filed exceptions.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondents Colonie Hill Ltd. and John Smythe Food Services, Inc., Hauppauge, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified.

1. Substitute the following for the Administrative Law Judge's recommended Order:

> "Colonie Hill, Ltd. and John Smythe Food Services, Inc., their respective officers, agents, successors, and assigns, shall pay to Mauro Squicciarini the sum of $21,976 as backpay and reimburse him for health related expenses totaling $981.92, plus interest accrued to the date of payment pursuant to the Board's Order and the court's judgment, minus the tax withholding required by Federal, state, and local laws, and shall also pay over to the employees listed in Appendix C the amounts of dues and initiation fees set forth therein together with such interest as may have accrued to the date of payment, pursuant to the Board's Order and the court's judgment."

2. Substitute the attached Appendix A for that of the Administrative Law Judge.

APPENDIX A

QUARTER	*GROSS*	*INTERIM*	*NET*
1973 - 3d	$3713	$-0-	$ 3713
- 4th	3386	1955	1431
1974 - 1st	3345	2276	1069
- 2d	3480	-0-	3480
- 3d	3525	2376	1149
- 4th	3060	2640	420
1975 - 1st	3345	3184	161
- 2d	3480	2640	840
- 3d	3525	3080	445
- 4th	3060	3219	(-)159
1976 - 1st	3345	3475	(-)130
- 2d	3480	2200	1280
- 3d	3525	-0-	3525
- 4th	3060	-0-	3060
1977 - 1st	2505	813	1692
			TOTAL $21,976

SUPPLEMENTAL DECISION AND ORDER

LEONARD M. WAGMAN, Administrative Law Judge: This supplemental proceeding to determine the amount of backpay due Mauro Squicciarini, whose employment was unlawfully terminated by Respondent Colonie Hill Ltd. and to determine the amounts of dues, initiation fees, and other moneys which Colonie Hill's employees paid to Local 100, Service Employees International Union, AFL-CIO, at a time when Colonie Hill was unlawfully enforcing the terms of a collective-bargaining

[1] *Colonie Hill Ltd.*, 212 NLRB 747 (1974).

[2] 519 F.2d 721 (2d Cir. 1975).

[3] Charging Party Squicciarini has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] In Appendix A of the Administrative Law Judge's Decision, the Administrative Law Judge made an error in the addition of the net figures of backpay due to Mauro Squicciarini. The net total should be $21,976, rather than $21,325 as found by the Administrative Law Judge. The recommended Order is modified accordingly.

Member Jenkins would award interest on backpay in accord with his dissent in *Olympic Medical Corp.*, 250 NLRB 146 (1980).

agreement with Local 100,[1] was heard before me on January 22, 23, and 24, and June 11 and 12, 1979, in Brooklyn, New York, on the General Counsel's backpay specification issued on November 22, 1977, and thereafter amended on April 12 and December 13, 1978, and at the hearing on June 12, 1979, and Respondents' answers. At the hearing, all parties had opportunity to introduce and to meet material evidence and to argue the issues on the record. Following the hearing, Respondents Colonie Hill and John Smythe Food Services, respectively, filed briefs.

Upon the record before me, and from my observations of the demeanor of the witnesses, and after careful consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE ISSUES

Upon consideration of the amended specification and Respondents' answers, I find that the issues presented are: (1) whether Respondents John Smythe and Colonie Hill are jointly and severally liable for those remedial payments, and (2) whether the amended specification proffered by the General Counsel is entitled to the Board's acceptance.

II. THE SUCCESSORSHIP OF JOHN SMYTHE FOOD SERVICES, INC.

A. *The Facts*

The specification alleged, and Respondent John Smythe admitted,[2] in its answer that:

> 2. On or about July 6, 1973, Colonie Hill Ltd., leased the employing enterprise and the real and personal property connected thereto to John Smythe Food Services, Inc., which took over and agreed to continue the enterprise for a term from August 1, 1973 to July 31, 1983.
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> * * * * *
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> 3. (b) Since on or about July 6, 1973, and at all times material thereafter, John N. Smythe has been and is the dominant officer and managing agent of John Smythe Food Services, Inc.
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> 4. Under the terms of the lease and understanding between Colonie Hill, Ltd., and John Smythe Food Services, Inc., Colonie Hill receives a percentage of gross receipts.
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> 5. The said lease required no payment or investment by Smythe; his sole financial obligation being to pay Colonie Hill said percentage of gross receipts, to operate the business, to maintain the physical plant, and to use and perpetuate the Colonie Hill trade name.
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> 6. At the time of the transfer of the business of John Smythe Food Services, Inc., the latter took over Colonie Hill's labor agreements, which, as extended and modified from time to time, it still recognizes.

The specification also alleged that John N. Smythe acted as Colonie Hill's general manager at the time of the unfair labor practices. Respondent John Smythe Food Services denied that allegation, but admitted that he was Colonie Hill's banquet manager at that time.

In its answer, Respondent Smythe denied the specification's allegation that it was Colonie Hill's successor. However, at the hearing, Smythe introduced no evidence in support of its denial. Nor did Smythe attempt to show that it took over the Colonie Hill facility without notice of the unfair labor practices of its predecessor.

B. *Analysis and Conclusions*

The General Counsel contended that Respondent John Smythe was a successor to Respondent Colonie Hill and that both are jointly and severally liable for remedying Colonie's unfair labor practices in this case. Smythe challenged this contention on the ground that it was not Colonie's successor. Colonie urged that it was no longer liable for any remedy because Smythe displaced it from the employing industry as of August 1, 1973. In the alternative, Colonie contended that it was not liable for backpay occurring after August 1, 1973. I find merit in the General Counsel's contention.

In *Perma Vinyl Corporation, Dade Plastics Co. and United States Pipe and Foundry Company*, 164 NLRB 968, 969 (1967), enfd. *sub nom. United States Pipe and Foundry Company* v. *N.L.R.B.*, 398 F.2d 544 (5th Cir. 1968), the Board recognized that in carrying out its statutory duty to remedy unfair labor practices it was not limited to obtaining a remedy from "the offending employer alone" but could require remedial action from "such employer's successors and assigns as well" (*Id.*) The Board went on to state that henceforth it would require successor employers to remedy the unfair labor practices committed by their predecessors where the successor "acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair practice charges against his predecessor . . . ."

"The keystone in determining successorship is whether there is substantial continuity of the employing industry." *Miami Industrial Trucks, Inc. and Bobcat of Dayton, Inc.*, 221 NLRB 1223, 1224 (1975). Factors which the Board considers in making this assessment include "whether there is substantial continuity in operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, product and services." (*Id.*)

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[1] *Colonie Hill, Ltd.*, 212 NLRB 747 (1974), enfd. 519 F.2d 721 (2d Cir. 1975).

[2] At the hearing I received G.C. Exh. 6, a letter on the stationery of the Board's Region 29, which purportedly before the signature of Compliance Officer Sidney H. Levy. The letter asserted confirmation of a telephone conversation between Levy and Francis P. Donelan, Esquires, who in the letter is represented as John Smythe Food Services' attorney. The letter also stated that Donelan advised that Respondent Smythe "had, in effect, acknowledged that it is the successor to Colonie Hill Ltd." Over the objections of Respondents Colonie and Smythe that no proper foundation had been laid to show that the letter had in fact originated from Sidney Levy and further that the assertions in the letter were hearsay, I received the letter only in support of Squicciarini's testimony that he received the actual exhibit at his home.

Respondent John Smythe "had the responsibility to establish that it was not a successor employer (if it were not) and that when it took over it was without notice of the unfair labor practices of its predecessor." *Mansion House Center Management Corporation and Central Parking System of St. Louis, Inc.*, 208 NLRB 684, 686 (1974). However, Smythe neglected this burden.

Smythe did not undertake its burden of proof as to the successorship issue. Instead, Respondent John Smythe admitted that on July 6, 1973, Colonie Hill leased its employing enterprise and the pertinent real and personal property to Respondent John Smythe, which firm took over and agreed to continue the enterprise for a 10-year term beginning on August 1, 1973. Respondent Smythe also admitted that it agreed to "maintain the physical plant" and to "use and perpetuate" the Colonie Hill trade name. Finally, Respondent Smythe obligated itself to undertake Colonie Hill's labor agreement and to continue to recognize that agreement as extended and modified. In light of Respondent Smythe's failure to show that it was not Colonie Hill's successor and upon consideration of its admissions, I find that Respondent Smythe substantially continued the employing industry operated by Colonie Hill, and thus became Colonie Hill's successor.

Respondent Smythe neither denied notice nor attempted to show lack of notice. Indeed, Respondent Smythe admitted that "John N. Smythe acted as banquet manager of Colonie Hill Ltd.'s aforesaid enterprise at the time of the earlier unfair labor practice." However, I find from its failure to deny notice and to offer evidence to show lack of notice that Respondent Smythe had notice of its predecessor's unfair labor practices.

Colonie Hill's contention that it is no longer liable to remedy its unfair labor practices in light of Smythe's successorship flies in the face of settled law. The Board in *Perma Vinyl Corporation*, 164 NLRB at 970, addressed the issue as follows:

> Our discussion thus far has dealt only with the bona fide purchaser of the employing enterprise. With respect to the offending employer himself, it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the discharges for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer. To the extent and in the manner indicated herein, the offending employer and his successor share a joint and several responsibility in the matter of backpay.

I therefore find that, under the Board's *Perma Vinyl* doctrine, Respondents John Smythe Food Services and Colonie Hill are jointly and severally liable for remedying the unfair labor practices found by the Board in this case. *Golden State Building Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento* v. *N.L.R.B.*, 414 U.S. 168, 175–177, 186–187 (1973); *Perma Vinyl Corporation*, 164 NLRB 969, 970.[3]

III. THE BACKPAY SPECIFICATION

A. *The Facts*

On November 22, 1977, the Regional Director for Region 29 issued and duly served on Colonie Hill Ltd. and John Smythe Food Services, Inc., a backpay specification and notice of hearing alleging the amount of backpay due employee Mauro Squicciarini and further amounts due him under the welfare benefits provisions of the collective-bargaining agreements between Respondent Colonie Hill and Local 100 Service Employees International Union, AFL–CIO. The same specification also provided for the reimbursement of the dues and initiation fees paid to Local 100 during the period from November 2, 1972, through July 31, 1973, by employees of Respondent Colonie Hill Ltd. Thereafter, on December 13, 1977, the Regional Director extended the time for answering his backpay specification to December 23, 1977.

On December 23, 1977, and on April 3, 1978, Respondents John Smythe Food Services and Colonie Hill, respectively, filed written answers to the backpay specification. On December 13, 1978, the Regional Director issued an amendment to his backpay specification, alleging additional medical and hospital expenses to Squiccarini's claim under the health and welfare provision. On April 12, 1978, the Acting Regional Director for Region 29 issued an order amending paragraph III of the backpay specification. The amendment noted that, in the event the Board did not agree that, Squicciarini would have received the weekly salaries set out in paragraph III, Squicciarini would have received a $10 weekly increase as of July 1, 1977, through February 24, 1978.

In its answer to the backpay specification, Respondent Smythe specifically denied that Squicciarini would have received the salaries alleged by the General Counsel, and affirmatively asserted that Squicciarini "would not have been promoted to the non-bargaining unit positions of either Chief Engineer or Department Head of the Maintenance and/or Kitchen Departments."

Respondent Smythe's answer raises an issue as to Squicciarini's entitlement to overtime during the period from June 24, 1973, through October 1, 1976. In its answer, Respondent Smythe contends that Squicciarini did not fulfill "his duty to make a reasonable effort to secure other employment for any day in which he had not admitted interim earnings." Respondent Smythe also contends that Squicciarini "had greater earnings than those admitted by him. . . ."

Respondent Colonie Hill's answer contains contentions regarding Squicciarini's efforts to obtain employment and his gross earnings similar to those in Smythe's answer. Respondent Colonie Hill did not otherwise challenge the backpay specification.

[3] On the third day of the hearing, I granted Respondent Lackman's motion to dismiss the amended backpay specification as to Lackman. Neither the General Counsel nor any other party to this proceeding appealed to the Board or otherwise challenged this ruling, which I now reaffirm.

At the hearing, neither Respondent Colonie Hill Ltd. nor Respodent Smythe presented any evidence. Instead, they both rested as soon as the General Counsel announced that he was resting his case.

The General Counsel presented testimony in support of the allegation that during the backpay period, beginning with the week ending January 3, 1975, until May 15, 1978, Squicciarini would have received weekly salaries ranging from $275 to $400. By this testimony the General Counsel endeavored to show that Squicciarini was entitled to promotion to a supervisory position by Respondent Smythe.

I find that the General Counsel's efforts fell short of his objective. The record showed that Squicciarini was a maintenance supervisor under Respondent Colonie Hill's operation of the Colonie Hill facility from March 1972 until May 1973, when he was demoted. The record also shows that for two 1-week periods between 1977 and early 1978, during Respondent Smythe's operation of the facility, Squicciarini acted as a maintenance supervisor. However, there was no showing that Squicciarini's qualifications entitled him to be a supervisor in Respondent Smythe's management. The evidence did not permit me to set Squicciarini's qualifications to those of employees Smythe selected for supervision during the period under scrutiny. Moreover, the General Counsel's witness Nicholas Guererra, Respondent Smythe's chief engineer, who supervised Squicciarini, did not consider him to be qualified to be a supervisor.

B. *Analysis and Conclusions*

Respondents Colonie Hill and John Smythe contend that the General Counsel failed to establish Squicciarini's entitlement to medical and dental expenses of the backpay specification. The two Respondents also challenged the General Counsel's claim that Squicciarini was entitled to promotion to a supervisory position during the backpay period. Finally, they would have me dismiss the entire backpay specification on the ground that the General Counsel failed to maintain his burden of proof. Aside from the supervisory issue, I do not agree with Respondents.

The "finding of an unfair labor practice . . . . is presumptive proof that some backpay is owed." *N.L.R.B.* v. *Mastro Plastics Corporation and French American Reeds Manufacturing Company*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden in backpay proceedings is simply to show the gross backpay due said claimant. *Mastro Plastics Corporation and French-American Reeds Manufacturing Co., Inc.*, 136 NLRB 1342, 1346 (1962). Once that is done in the backpay specification, the employer has the burden of establishing affirmative defenses which would mitigate his liability including willful loss of earnings and interim earings to be deducted from the backpay award. *N.L.R.B.* v. *Brown & Root, Inc., etc.*, 311 F.2d 447, 454 (8th Cir. 1963); *Southern Household Products Company, Inc.*, 203 NLRB 881, fn. 2 (1973). *Heinrich Motors, Inc.*, 166 NLRB 783 (1967). Here, assuming that Respondents Colonie Hill Ltd. and John Smythe by their answers raised issues regarding Squicciarini's willful loss of earnings or the amount of his interim earnings, their failure to present any evidence left these affirmative defenses unsupported. *Dan Lipman, Norman Ruttenberg and Abe Goldstein, a partnership, d/b/a Ascot Nursing Center*, 234 NLRB 1233, 1234 (1978).

Also without merit was Respondents Colonie Hill's and Smythe's contentions in their respective briefs that Squicciarini was not entitled to medical and dental expenses. The Board has recognized that its backpay orders include "hospital and medical expenses [the discriminatee] was required to pay and which he would have recovered from the welfare fund but for Respondent's act of discharging him." *Sam Tanksley Trucking, Inc.*, 210 NLRB 656, 660 (1974).

In the instant case, both Colonie Hill Ltd. and John Smythe Food Services were party to collective-bargaining agreements with Local 100 under which, as the backpay specification alleges, Squicciarini was entitled to medical and dental benefits during the backpay period. Further, Respondents Colonie Hill and John Smythe did not challenge Squicciarini's entitlement to health related expenses in their answers and did not present any evidence to rebut the General Counsel's *prima facie* case. I shall, therefore, accept as true the backpay specification's allegation and the amendments thereto. *Seven Motors, Ltd. d/b/a Mazda South, et al.*, 252 NLRB 791 (1980); *Ascot Nursing Home, supra.*

The General Counsel's backpay specification did not reveal the contention that Squicciarini was entitled to promotion to supervisor. Instead, the General Counsel's backpay specification alleges that effective the week ending January 3, 1975, Squicciarini was entitled to a weekly salary which increased from $275 to $400. Thus, the specification did not reveal on what ground Squicciarini was entitled to those salaries rather than the hourly wages of a bargaining unit employee.

At the hearing, the General Counsel, for the first time, advanced this presumption. Beyond doubt, if the evidence establishes Squicciarini's entitlement to such a promotion, following the unlawful discharge, the Board is empowered to make him whole by requiring his "reinstatement to that which [he] would have had but for the unlawful discrimination." *Golden State Bottling Company Inc., d/b/a Pepsi Cola Bottling Company of Sacramento*, 187 NLRB 1017, 1022 (1971), enfd. 467 F.2d 164 (9th Cir. 1972), affd. 414 U.S. 168 (1973).

However, the General Counsel did not sustain his burden of providing evidentary support for his presumption that Squicciarini was entitled to a promotion to a supervisory position in Respondent Smythe's management of the Colonie Hill facility. Cf. *J. S. Alberici Construction Co., Inc.*, 249 NLRB 751 (1980). Accordingly, in determining Squicciarini's backpay claim, I shall look to the hourly rates applicable to him as a unit employee as they are set out in the amended specification. I shall also accept as fact, the General Counsel's computations of Squicciarini's backpay as a unit member.

I therefore find that Mauro Squicciarini is entitled to recover the sum of $21,325, plus interest, to make him whole for the loss of earnings suffered by reason of the

discrimination against him.[4] I also find that Squicciarini is entitled to reimbursement for health related expenses totaling $981.92, plus interest.[5] Finally, I find that each of the employees named in Appendix C [omitted from publication] is entitled to recover the sum shown next to his or her name plus interest to make each of them whole for the amounts of dues and initiation fees which they were required to pay to Local 100 during the period from November 2, 1972, through July 31, 1973, plus interest.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

Respondents Colonie Hill Ltd. and John Smythe Food Services, Inc., their respective officers, agents, successors, and assigns, shall pay to Mauro Squicciarini the sum of $21,325 as backpay and reimburse him for health related expenses totaling $981.92, plus interest accrued to the date of payment pursuant to the Board's Order and the court's judgment, minus the tax withholding required by Federal, state, and local laws, and shall also pay over to the employees listed in Appendix C [omitted from publication] the amounts of dues and initiation fees set forth therein together with such interest as may have accrued to the date of payment, pursuant to the Board's Order and the court's judgment.

[4] Appendix A [omitted from publication] shows the manner in which Squicciarini's backpay was computed.

[5] See Appendix B [omitted from publication] for a statement of Squicciarini's medical and dental expenses during the backpay period.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.